

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff

v.

BRYAN JAMES GALLAGHER,

Defendant

2:15-cr-00028-JAD-PAL

**Order Granting Government's Motion
in Limine to Exclude Evidence
[ECF 22]**

Bryan Gallagher stands charged with being a felon in possession of a firearm.¹ The government moves to exclude evidence of (1) the reduction of Gallagher's state-court felony conviction to a gross misdemeanor and (2) Gallagher's purported belief that he was not a prohibited person at the time he possessed the rifle that serves as the basis for his charge.² Because the reduction of Gallagher's conviction—which occurred *after* the firearm possession charged in the indictment—and his ignorance of his prohibited status are not relevant to any claim or defense, I grant the government's motion.³

Background

On December 13, 2010, Gallagher pleaded guilty in state court to felony battery-strangulation.⁴ Under the parties' written plea agreement, if Gallagher successfully completed probation and were given an honorable discharge, he would be allowed to withdraw his plea and enter a new plea to conspiracy to commit battery-strangulation—a gross misdemeanor.⁵ Almost two

¹ ECF 1.

² ECF 22.

³ I find this motion suitable for disposition without oral argument. Nev. L.R. 78-2.

⁴ ECF 24-1.

⁵ *Id.* at 2.

1 years later, in December 2012, Gallagher was honorably discharged from probation.⁶ He did not,
2 however, take the important step of moving to withdraw his felony guilty plea.

3 In November 2014, Gallagher was arrested and again charged in state court with battery-
4 strangulation.⁷ During the domestic disturbance call that led to that arrest, police found a rifle
5 attributed to the defendant; a search of Gallagher's truck pursuant to a warrant uncovered a pistol.
6 Gallagher then moved to reduce his felony conviction under the terms of his earlier plea agreement.
7 The state court granted his request on December 15, 2014, and Gallagher pleaded guilty to a gross
8 misdemeanor. Federal authorities picked up the gun charges and on January 27, 2015, Gallagher was
9 indicted on two counts of being a felon in possession of a firearm for his November 2014 possession
10 of the rifle and pistol.⁸ Shortly thereafter, the state of Nevada dismissed its case against Gallagher.
11 The government anticipates that Gallagher will attempt to reference at trial both the reduction of his
12 state-felony conviction and his purported belief that he was not a person prohibited by law from
13 possessing firearms at the time of his November 2014 arrest.

14 Discussion

15 The Federal Rules of Evidence do not explicitly authorize motions in limine but, under the
16 district court's trial-management authority, judges can rule on pre-trial evidentiary motions.⁹ Limine
17 rulings are provisional; they are "not binding on the trial judge [who] may always change his mind
18 during the course of a trial."¹⁰ Federal Rule of Evidence 401 states that "[e]vidence is relevant if: (a)
19 it has any tendency to make a fact more or less probable than it would be without the evidence; and
20 (b) the fact is of consequence in determining the action." 29 USC § 922(g)(1) makes it unlawful for
21 any person who has been convicted of a felony to knowingly possess a firearm. To sustain a
22 conviction under §922(g)(1), the government must prove three elements: (1) the defendant was a

23 ⁶ ECF 23-1 at 10–11.

24 ⁷ ECF 24-3.

25 ⁸ ECF 1.

26 ⁹ *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984).

27 ¹⁰ *Ohler v. United States*, 529 U.S. 753, 758, n. 3 (2000).

1 convicted felon, (2) the defendant was in knowing possession of a firearm, and (3) the firearm was in
2 or affecting interstate commerce.¹¹ Knowledge of prohibited status is not an element of the
3 offense—a person charged with being a felon in possession of a firearm is not required to know that
4 he is a prohibited person in order to be convicted of this offense.¹² And the government need only
5 prove that the defendant was a convicted felon at the time the defendant is alleged to have possessed
6 the firearm; a decision later overturning or otherwise invalidating the defendant’s underlying
7 conviction will not absolve him of liability.¹³

8 The government argues that the December 2014 reduction of Gallagher’s felony conviction is
9 irrelevant because the state court did not withdraw his felony guilty plea until after the date of the
10 conduct alleged in the indictment.¹⁴ The government also argues that any evidence that Gallagher
11 was mistaken about his felon status is irrelevant because Gallagher’s knowledge of his felon status is
12 not an element of the offense.¹⁵ Gallagher responds generally that he has a constitutional right to
13 present a complete defense.¹⁶ Gallagher argues that the reduction of his conviction and his belief that
14 he was no longer a felon are relevant to his entrapment-by-estoppel defense.¹⁷

15 Entrapment by estoppel occurs when an authorized government official tells a defendant that
16 certain conduct is legal and the defendant reasonably believes and relies on that information.¹⁸ But
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18 ¹¹ *United States v. Beasley*, 346 F.3d 930, 933–34 (9th Cir. 2003).

19 ¹² *Cf. United States v. Miller*, 105 F.d 552, 555 (9th Cir. 1997) (holding that “[t]he Government did
20 not need to prove that [a defendant] knew the firearm [or ammunition] had traveled in interstate
21 commerce” to obtain a conviction under 922(g)(1)) (overruled in part on other grounds by *Caron v.*
22 *United States*, 524 U.S. 308 (1998)).

23 ¹³ *See United States v. Padilla*, 387 F.3d 1087, 1092 (9th Cir. 2004).

24 ¹⁴ ECF 22 at 3.

25 ¹⁵ *Id.* at 6.

26 ¹⁶ ECF 23 at 4.

27 ¹⁷ *Id.* at 6.

28 ¹⁸ *United States v. Rodman*, 776 F.3d 638, 643 (9th Cir. 2015).

1 Gallagher has not alleged that any government official “affirmatively misled” him.¹⁹ Instead,
2 Gallagher claims that he was never informed that his felony reduction would not occur automatically
3 and that he was never informed that he could not own or possess a firearm even after he successfully
4 completed probation.²⁰

5 In *United States v. Brebner*,²¹ the Ninth Circuit upheld a district court’s denial of defendant
6 Brebner’s entrapment-by-estoppel defense because there was “no evidence of any type of affirmative
7 misleading”; there was no evidence in the record that a federal official “expressly told Brebner that
8 it was lawful for him to purchase the firearms.”²² Like Brebner, Gallagher does not allege, and the
9 record does not reveal, that a government official ever expressly told Gallagher that his conviction
10 would automatically be reduced upon completion of probation and that he could then lawfully
11 possess firearms. In fact, Gallagher’s plea agreement supports the opposite conclusion. “If
12 Defendant successfully completes probation and is given an honorable discharge, then Defendant
13 **can** withdraw his plea and enter a plea to (Gross Misdemeanor).”²³ The plain language of the plea
14 agreement expressly makes clear that Gallagher’s conviction would not be reduced automatically.

15 Because Gallagher’s conviction was not reduced until after the conduct alleged in the
16 indictment, the reduction is irrelevant to his felon-in-possession charges. On the date the rifle and
17 pistol were found in his home and truck, Gallagher was a convicted felon and a prohibited person for
18 § 922(g)(1) purposes. Additionally, as his knowledge of his felon status is not an element of the
19 offense, it is irrelevant and would merely confuse the issues for the jury. Finally, because Gallagher
20 cannot raise a valid estoppel-by-entrapment defense, this evidence is also inadmissible for that
21 purpose. Accordingly, I grant the government’s motion to exclude this evidence because it is not
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23 ¹⁹ *United States v. Talmadge*, 829 F.2d 767, 776 (9th Cir. 1987) (holding that estoppel applies where
24 the official’s statements affirmatively mislead the defendant).

25 ²⁰ ECF 23 at 6.

26 ²¹ *United States v. Brebner*, 951 F.2d 1017 (9th Cir. 1991).

27 ²² *Brebner*, 951 F.2d at 1026.

28 ²³ ECF 24-1 at 2 (emphasis added).

1 relevant for any permissible purpose.

2 **Conclusion**

3 IT IS HEREBY ORDERED that the government's Motion in Limine to Exclude Evidence
4 **[ECF 22]** is **GRANTED**.

5 At trial, Gallagher will not be permitted to introduce evidence that his felony conviction was
6 ultimately reduced and that he was ignorant of his prohibited status.

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8 Dated this 5 day of October, 2015

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11 _____
12 Jennifer A. Dorsey
13 United States District Judge
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